SUPREME COURT, U.S.
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No. 80-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. WOLSKI,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Was the affidavit in support of the search warrant sufficient to meet the requirements of the fourth amendment?

2. Does the instant case fall outside the scope of *Franks* v. *Delaware* with the result that the affidavit for the search warrant was valid?

3. Could the initial restraint of petitioner's person, required for the execution of the search warrant by police officers form the basis for suppression of petitioner's oral statement?

4. Was there sufficient evidence presented at trial to raise the defense of self-defense so that the trial court was required to instruct the jury on self-defense?

5. Did the Illinois appellate court's application of the farce or sham standard used to evaluate petitioner's claim of ineffective assistance of counsel protect his fourteenth amendment rights to effective assistance of counsel and equal protection of the laws?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Illinois Appellate Court was correctly cited in petitioner's brief. (Petition at 2)

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those amendments to the United States Constitution applicable to this case. (Petition at 3).

STATEMENT OF THE CASE

In addition to the Statement of the Case set forth in petitioner's brief (Petition at 5-10), additional facts needed for this Court to consider the Petition for Writ of Certiorari can be found in the Illinois appellate court's opinion, *People* v. *Wolski,* 83 Ill. App.3d 17, 403 N.E.2d 528 (2d Dist. 1980).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court deny the Petition for Writ of Certiorari to review the judgment of the Illinois Appellate Court, Second District, insofar as petitioner's issues do not raise questions of constitutional proportion that are worthy of review. In seeking a writ of certiorari in this cause, petitioner alleges five separate reasons for granting the writ. The issues involve questions of particular application of recent and well-defined decisional law of this Court to the facts of the instant case. Respondent maintains that it would not be prudent for this Court to grant certiorari because the issues herein revolve around facts peculiar to the case at bar and would not involve issues germane to any future litigants.

I.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO MEET THE REQUIREMENTS OF THE FOURTH AMENDMENT.

The petitioner contends that the statements in the affidavit were not facts but mere conclusions, and that the allegations were not made with sufficient detail to supply the magistrate

with probable cause. However, an affidavit is not required to set out the facts in minute detail. It is clear that affidavits for search warrants are to be tested in a common sense and realistic fashion. All efforts should be made to avoid hypertechnical interpretations and doubtful cases should be determined largely by the preference which the law accords to warrants. *United States* v. *Ventresca,* 380 U.S. 102 (1965).

The affidavit stated that the Master Charge slip was found near the body of the decedent. In fact, the evidence was found approximately 6 feet from the body. Respondent maintains that at that distance, the charge slip was certainly near the body. The magistrate also had present the officer who discovered the charge slip at the crime scene. If the magistrate questioned the meaning of the word "near" that information would have been available to him.

The petitioner argues that the affidavit was defective for the reason that there was not a description by the affiant of the source of information, thus preventing the magistrate from making any determination of the reliability of that information. Respondent would point out that the police officer who was the affiant appeared in person, under oath, before the magistrate. All of the facts in the affidavit were either facts known to the affiant personally or obtained through the investigations undertaken by other officers. This type of hearsay information, the work product of other officers, has been held to provide a reliable basis for a warrant sought by one of the officers. When an officer applies for a search warrant based on information supplied by fellow officers, it is unnecessary for him to vouch the reasons he has for believing his informants are reliable. *United States* v. *Harrick,* 582 F.2d 329 (4th Cir. 1978). Therefore, the affidavit need not set forth the basis for the reliability of the facts. All the facts alleged in the affidavit were derived through police investigation by the affiant or other officers; and the source of the information concerning the decedent hitch-hiking, was a private citizen.

To require the affiant to minutely detail every fact appearing in an affidavit would not be in keeping with the realistic, common sense approach to complaints for search warrants. The courts below fully considered and correctly decided this issue.

Contrary to petitioner's position the respondent maintains that the presence of the petitioner's Master Charge slip at the crime scene was sufficient to generate reasonable grounds that the petitioner at least was connected in some way to the crime scene. The presence of the charge slip was sufficient to warrant a reasonable man in believing that petitioner was present at the crime scene at some point in time. Moreover, the date of the charge slip, July 21, the day before the body was discovered, further supported petitioner's relationship to the crime scene.

Once the petitioner was linked to the offense, it was reasonable to believe that evidence of his involvement, if any, would be found on his person, in his car, or at his residence. The assertions contained in the affidavit provided this reasonable basis linking petitioner to the offense and probable cause was established for issuance of the warrant.

This Court should deny the petition for a writ of certiorari in that the issues contained in the first argument of petitioner's brief are not important enough to warrant review. The issues are limited and controlled by the facts of the instant case.

II.

THE INSTANT CASE FALLS OUTSIDE THE SCOPE OF *FRANKS* V. *DELAWARE*, AND AS A RESULT THE AFFIDAVIT FOR THE SEARCH WARRANT WAS VALID.

Petitioner claims that the affidavit for the search warrant affirmatively misstated the facts and is, therefore, invalid under *Franks* v. *Delaware*, 438 U.S. 154 (1978). Petitioner takes issue with the use of the word "near" to describe the placement

of the Master Charge receipt in the affidavit for the search warrant. Petitioner's reliance on the *Franks* decision is misplaced. In *Franks,* this Court held that where a defendant makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-56. The foundation requirement of a false statement which must be present to necessitate a hearing on the issue is not found in the instant case.

Respondent maintains that in the context in which the word "near" was used, it was not a false statement. The use of the word "near" by the affiant was truthful in the sense that the information regarding the location of the Master Charge receipt in the affidavit was believed or appropriately accepted by the affiant as true. *Id.* at 165. Although "near" is a relative term to describe distance, it cannot be found to be a false statement in the context of the *Franks* decision. The word "near" clearly was sufficiently descriptive of where the charge slip was found. The charge slip was found approximately six feet from the body of the victim in underbrush in a wooded area. That distance clearly locates the charge slip near the body in the common sense understanding of the word. Therefore, it cannot be said that there was any misstatement of facts, deliberate or otherwise in the affidavit.

Furthermore, if "near" is not construed as descriptive of a distance of six feet, it is clear that the use of the word "near" was not a deliberate falsehood on the part of the officer or even a reckless disregard for the truth. The language used in the affidavit was chosen in good faith by the officer who would be reasonable in assuming that six feet was equivalent to "near". The petitioner has not demonstrated any intentional or deceptive misstatements by the officer such as would invalidate the search warrant.

Assuming *arguendo* that the word "near" should not have been used, the affidavit did set forth particular facts and circumstances underlying the existence of probable cause so as to allow the magistrate to make an independent evaluation of the matter. Consequently, the magistrate reviewing the application for the warrant is entitled to draw reasonable inferences from the facts contained in the affidavit based upon his experience in such matters. In the case at bar, the affidavit should be considered in a commonsense, nontechnical manner with deference given, in a marginal case, to the prior determination of probable cause by the issuing authority. *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969). Based upon these unique circumstances the use of the word "near" in the affidavit for the search warrant did not violate petitioner's fourth amendment rights.

III.

THE INITIAL RESTRAINT OF PETITIONER'S PERSON, REQUIRED FOR THE EXECUTION OF THE SEARCH WARRANT BY POLICE OFFICERS, COULD NOT FORM THE BASIS FOR SUPPRESSION OF PETITIONER'S ORAL STATEMENT.

The petitioner contends that he was under arrest at the time of the initial encounter with police officers outside his residence, although at the time probable cause for the arrest did not exist. Despite the petitioner's contentions to the contrary, the petitioner was not under arrest at the time of the initial encounter with the police. At the hearing on petitioner's motion to suppress statements, three police officers who were present during the search testified that petitioner had not been placed under arrest before the search of his residence disclosed his blood-stained undershorts. Petitioner's argument that the initial restraint of his person amounted to an illegal arrest requiring suppression of his statement is illogical. Petitioner must necessarily have been reasonably restrained in order for police to execute the search of his person.

The police were acting pursuant to a valid search warrant which authorized the search of petitioner's person, residence, and automobile. Respondent concedes that petitioner was "seized," in that his freedom of movement was restrained during the execution of the search warrant. However, the fourth amendment is not required to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. *United States* v. *Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980). The objective justification for the seizure was for the execution of the search warrant. In the case at bar, the seizure of petitioner was made pursuant to the execution of the search warrant. The encounter between petitioner and the police intruded upon no constitutionally protected interest.

Upon execution of the search warrant, an item described in the warrant, blood-stained undershorts, was discovered. It was at this point, after the discovery of the evidence, that the police had probable cause to believe petitioner committed an offense, thus justifying his arrest. Based upon evidence discovered pursuant to a valid search, probable cause existed to arrest petitioner. Insofar as the arrest was valid, it follows that petitioner's statement to the police was admissible at trial.

IV.

SINCE THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO RAISE THE DEFENSE OF SELF-DEFENSE, THE TRIAL COURT CORRECTLY REFUSED TO INSTRUCT THE JURY ON SELF-DEFENSE.

Petitioner alleges that the trial court's refusal to instruct the jury on his claim of self-defense denied petitioner the right to a jury trial and due process of law. Respondent does not dispute that a defendant is entitled to adequate instructions to the jury

on his theory of defense, provided there is evidence to reasonably support the theory and permit a jury rationally to find him innocent. *United States* v. *Hoopes,* 545 F.2d 721 (10th Cir. 1976). Respondent agrees with this general proposition, but r aintains that a self-defense instruction to the jury was incompatible with the evidence presented at trial.

Petitioner tendered a jury instruction on self-defense which provided that "a person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." The jury instruction on self-defense was taken directly from Ill. Rev. Stat., ch. 38, § 7-1 which defines the justifiable use of force in defense of a person. The Committee Comments to section 7-1 state that a person "must actually believe that the danger of harm exists and that his use of force is necessary to avert the danger." Ill. Ann. Stat. ch. 38, § 7-1 (Smith-Hurd).

The trial court refused the instruction for the reason that the court concluded the evidence did not present evidence of the defense. Accepting petitioner's version of the incident no fair minded jury would have believed that petitioner was in fear at the time he struck the decedent. Petitioner struck her on the head with a 2½ lb., 11½" long steel bar while positioned on top of her on the front seat of his car; he was 26 years old, a veteran, and weighed approximately 265 pounds while decedent was 14 years old and weighed about 120 pounds. It is clear that the evidence adduced at trial did not constitute any evidence that petitioner reasonably believed that it was necessary to use deadly force to prevent imminent death or great bodily harm to himself.

On the evidence presented, it would have been unreasonable for the jury to acquit the petitioner of murder on the theory of self-defense. Petitioner was not entitled to a self-defense jury instruction merely because he requested the instruction. His

conduct was such as to refute the claim of self-defense, and therefore, his contention that he acted in self-defense was obviously an after-thought. In view of the undisputed evidence that the decedent was brutally beaten to death, no error was committed by the court's failure to give the tendered instruction. The Illinois appellate court fully considered and correctly decided this issue. Therefore, this Court should deny the petition for a writ of certiorari.

V.

THE ILLINOIS APPELLATE COURT'S APPLICATION OF THE FARCE OR SHAM STANDARD USED TO EVALUATE PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PROTECTED HIS FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND EQUAL PROTECTION OF THE LAWS.

1. The Farce Or Sham Standard Used To Evaluate Petitioner's Claim of Ineffective Assistance Of Counsel Sufficiently Protected His Rights Under The Sixth And Fourteenth Amendments.

Petitioner contends that the Illinois courts' application of the farce or sham standard in evaluating a claim of ineffective assistance of trial counsel is not a constitutionally permissible standard. This Court must reject petitioner's claim in that the Illinois standard is sufficient to protect petitioner's sixth and fourteenth amendment rights.

To test a claim of ineffective assistance of trial counsel in Illinois, a defendant must prove that the caliber of representation was so low as to reduce the trial to a farce or a sham. *People* v. *Washington,* 41 Ill.2d 16, 241 N.E.2d 425 (1968). Illinois courts have characterized this standard as requiring a showing of no representation at all, *People* v. *DeSimone,* 9 Ill.2d 522, 138 N.E.2d 556 (1956), or such representation as to

deprive the defendant of the chance of being acquitted of the offense. *People* v. *McCoy,* 80 Ill. App.2d 257, 225 N.E.2d 123 (1st Dist. 1967). Courts have held it is not enough to sustain the allegation of ineffective assistance of counsel by demonstrating that the representation was merely poor, *People* v. *Hicks,* 362 Ill. 238, 199 N.E. 368 (1935), or by showing that counsel's trial tactics were unsuccessful. *People* v. *Gill,* 54 Ill.2d 357, 297 N.E.2d 135 (1973).

Petitioner argues that the Illinois test for evaluating an ineffective assistance of counsel claim is not a constitutionally permissible standard of review. Respondent maintains that petitioner's proposed standard would not any better set forth the prerequisites demanded by the constitutional mandate to furnish defendants with effective assistance of counsel. No test can be formulated which will, in advance of close scrutiny of the trial record furnish a definitive checklist of what is needed to sustain a defendant's assertion of a constitutional deprivation by ineffective assistance of counsel.

The present test in Illinois is the product of competing public policies: the first is that every defendant should have available the means of securing every legal defense possible. The competing reason is the practical recognition that no attorney is perfect, no trial tactic is fail safe, and few trials are error free. *People* v. *Ortiz,* 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974). A second reason for allowing flexibility in the standard of review is to protect against mere pretended ineffective assistance on the part of trial counsel. *People* v. *Fleming,* 50 Ill.2d 141, 277 N.E.2d 872 (1971). The constitutional provision requires reversal of a conviction where it is shown that the legal representation caused such substantial prejudice to a defendant so as to deny him fundamental fairness. Specifically, in order to successfully sustain an allegation of inadequate representation at trial, the defendant must clearly establish (1) actual incompetence of counsel as reflected

by the manner of carrying out his duties at trial, and (2) substantial prejudice resulting, without which the outcome would probably have been different. *People* v. *Virgil,* 54 Ill. App. 3d 682, 370 N.E.2d 74 (1st Dist. 1977). However, the fact that another attorney in the light of hindsight might possibly have conducted the trial in a different manner should not be accepted as an indication of ineffectiveness. *People* v. *Baer,* 35 Ill. App.3d 391, 342 N.E.2d 177 (1st Dist. 1976).

The standard used by the Illinois court in the instant case is an acceptable one under the United States Constitution for reviewing an incompetency of counsel claim. In the case at bar the Illinois appellate court applied the standard and from its examination of the record it found "the representation afforded to defendant did not violate this standard." *People* v. *Wolski,* 83 Ill. App. 3d 17, 27, 403 N.E.2d 528, 536 (2nd Dist. 1980). The Illinois standard is an adequate expression of the rationale behind the sixth and fourteenth amendments, and consequently should withstand constitutional scrutiny.

2. The Farce Or Sham Standard, Under Which Illinois Courts Review Claims Of Ineffective Assistance Of Counsel Is Applied For Both Appointed And Retained Counsel.

Petitioner argues that under Illinois law, a different standard is used to review claims of ineffective assistance of retained counsel versus claims of ineffective assistance of appointed counsel. This Court must reject petitioner's claim as the standard applied by the Illinois reviewing courts for evaluating claims of ineffective assistance of counsel is the same for both retained and appointed counsel.

It is true that Illinois appellate courts in the past reviewed a defendant's claim of ineffective assistance of counsel by utilizing separate and distinct tests based upon whether counsel was privately retained or court-appointed. *People* v. *Morris,* 3 Ill.2d

437, 121 N.E.2d 810 (1954). Under *Morris,* a defendant who retained his own counsel could not raise the claim of counsel's failure to exercise care and skill in the trial of the case as a basis for reversing a judgment of conviction. *Id.* at 444-45, 121 N.E.2d at 815. However, a defendant who was represented by court-appointed counsel could claim ineffective assistance of counsel and obtain a reversal of the conviction. Petitioner relies on the *Morris* decision for his position that Illinois courts use a different, higher standard for evaluating the quality of representation accorded a defendant with retained counsel as compared to a defendant with court-appointed counsel.

Subsequent Illinois Supreme Court decisions expanded the right to adequate assistance of counsel so that a defendant with retained counsel could raise the claim on appeal of ineffective assistance of counsel. *People* v. *Somerville,* 42 Ill.2d 1, 5, 245 N.E.2d 461, 464 (1969); *People* v. *Nelson,* 42 Ill.2d 172, 175, 246 N.E.2d 244, 246 (1969). While the cases speak in terms of some distinctions between retained counsel and court-appointed counsel, it appears that the necessity for showing ineffective assistance of counsel is essentially the same in both instances. The Illinois appellate courts have flatly rejected the argument that the standard for evaluating the representation of retained counsel differs from the standard used for evaluating the representation of court-appointed counsel. The requisite standard which has developed is the same, namely, the ineffectiveness of counsel must not be of such character as to reduce the trial to a farce or sham. *People* v. *Virgil,* 54 Ill. App.3d 682, 370 N.E.2d 74 (1st Dist. 1977); *People* v. *Ortiz,* 22 Ill. App.3d 788, 317 N.E.2d 763 (1st Dist. 1974).

Illinois law, by providing for a uniform standard for reviewing claims of ineffective assistance of trial counsel, has protected the petitioner's rights to the equal protection of the laws.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

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